UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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PASHA ANWAR, et al.,

Plaintiffs,

-against-

FAIRFIELD GREENWICH LIMITED, et al.,

Defendants.

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09 Civ. 0118 (VM)(THK)

ORDER

THEODORE H. KATZ, UNITED STATES MAGISTRATE JUDGE.

The Court has considered the parties' letter-submissions dated October 8, 9, 13, 14, 21, and 22, 2009, regarding the applicability of the Private Securities Litigation Reform Act ("PSLRA") discovery stay to this action, and concludes as follows:

1. Plaintiffs have asserted federal securities law claims in their Second Consolidated Amended Complaint, dated September 29,

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2009 ("SCAC"). Thus, in the first instance, "all discovery . . . shall be stayed" until after disposition of Defendants' anticipated motions to dismiss. See 15 U.S.C. § 78u-4(b)(3)(B). "All discovery" includes any initial disclosures otherwise required under Rule 26(a)(1) of the Federal Rules of Civil Procedure.

2. Plaintiffs' state law claims are sufficiently intertwined with their federal securities law claims such that any discovery sought for the state law claims would likely mirror that sought for the federal securities law claims. Indeed, the discovery Plaintiffs seek - all of the discovery certain Defendants produced in a Massachusetts regulatory action asserting securities

violations under Massachusetts law - relates directly to securities claims. It would be difficult, if not impossible, to parse out discovery on a claim by claim basis. Therefore, the stay applies equally to all claims asserted in the SCAC. See In re Smith Barney Transfer Agent Litig., No. 05 Civ. 7583 (WHP), 2006 WL 1738078, at *3 (S.D.N.Y. June 26, 2006) (refusing to lift stay "on a line-item basis for non-securities claims that are alleged in a securities complaint"); Rampersad v. Deutsche Bank Securities Inc., 381 F. Supp. 2d 131, 134 (S.D.N.Y. 2003) (refusing to lift stay with respect to state law claims only, because all of the claims arose "from the same allegations of a scheme of unauthorized and unsuitable investment decisions"); see also SG Cowen Securities Corp. v. U.S. Dist. Ct. for N.D. Cal., 189 F.3d 909, 913 (9th Cir. 1999) (declining to lift stay of discovery on state law claims); cf. Tobias Holdings, Inc. v. Bank United Corp., 177 F. Supp. 2d 162, 166-67 (S.D.N.Y. 2001) (granting motion to lift stay over "separate and distinct" state law claims, because case was "not a class action" with a "coercive aspect to plaintiff's discovery demands," and "permitting discovery to proceed here would not represent an impermissible 'end run' around the PSLRA's automatic discovery provisions").

3. Plaintiffs previously "determined that [asserting federal securities law claims] was not in the best interests of the class" due, in part, to "the potential application of the discovery stay

under the PSLRA." See Memorandum of Law in Support of the Anwar Plaintiffs For Appointment as Lead Plaintiffs and For Approval of Lead Counsel, dated May 11, 2009, at 4. This representation suggests that Plaintiffs are indeed seeking an "end run" around the PSLRA discovery stay that they initially sought to avoid by omitting their federal securities law claims.

4. Plaintiffs seek "access to the same discovery materials [secured by] claimants in other proceedings" against Defendants, and "basic information identifying the amounts invested in the Funds by class members and received by them through redemptions, so that plaintiffs can calculate" their alleged losses. See Letter from David A. Barrett, dated Oct. 9, 2009 ("Barrett Ltr."), at 2. Plaintiffs have not shown, however, that "particularized discovery is necessary to preserve evidence or to prevent undue prejudice." See 15 U.S.C. § 78u-4(b)(3)(B).

5. Plaintiffs have made no argument that the stay should be lifted to preserve evidence. Plaintiffs argue that in light of the settlement of a Massachusetts regulatory action brought against certain of the Fairfield entity Defendants, and ongoing settlement discussions in other related actions, continued imposition of the stay would prejudice their claims. According to Plaintiffs, Defendants have a limited pool of assets to satisfy any potential settlement or judgment in this action, and depriving them of discovery will prevent them from engaging in meaningful settlement

discussions. Plaintiffs, however, have asserted claims against over 40 different Defendants, many of which are not Fairfield entities. In addition, the $8 million settlement in the Massachusetts action is relatively insignificant in relation to Plaintiffs' self-coined "multi-billion dollar size . . . claims." See Barrett Ltr., at 1. Thus, Plaintiffs have failed to show that Defendants' isolated settlement in another litigation would unduly prejudice them in this case, particularly since Defendants "have not settled with any private litigant or any other regulator and no additional Massachusetts type settlements are on the horizon." See Letter from Mark G. Cunha, dated Oct. 9, 2009 ("Cunha Ltr."), at 11. Nor have Plaintiffs shown that "unique circumstances" exist such that Plaintiffs might "be left to pursue [their] action against defendants who no longer have anything or at least as much to offer" in a potential settlement or judgment. See In re WorldCom, Inc. Securities Litig., 234 F. Supp. 2d 301, 305 (S.D.N.Y. 2002). In any event, "Plaintiffs' inability to gather evidence for settlement negotiations or to plan a litigation strategy is not evidence of undue prejudice." In re Refco, Inc., No. 05 Civ. 8626, 2006 WL 2337212, at *2 (S.D.N.Y. Aug. 8, 2006); see also Brigham v. Royal Bank of Canada, No. 08 Civ. 4431 (WHP), 2009 WL 935684, at *2 (Apr. 7, 2009) (denying motion to lift PSLRA stay after defendant settled with regulatory agency, because "[t]here is no risk that [plaintiff] will be left at a disadvantage compared to . . . other plaintiffs"); Smith Barney, 2006 WL 1738078, at *2 (declining to lift stay following defendants' $208 million settlement with the SEC since plaintiffs failed to show "that Defendants lack the resources needed to reach a settlement or to satisfy a judgment"). Further, that certain Defendants produced documents and information to oversight agencies in other proceedings does not give rise to prejudice in this action. See, e.g., 380544 Canada, Inc. v. Aspen Tech., Inc., No. 07 Civ. 1204 (JFK), 2007 WL 2049738, at *5 (S.D.N.Y. July 18, 2007) (rejecting plaintiffs' argument that they would be unduly prejudiced if they are unable to obtain documents already produced to the SEC and the United States Attorney's Office).

5. The request to lift the discovery stay by Derivative Plaintiffs (Plaintiffs in the Ferber, Pierce, and Morning Mist actions) is premature. As indicated in this Court's Order, dated September 16, 2009, "[t]he issue of discovery in the derivative actions will be addressed after the [pending] remand motions are decided." The Court anticipates a decision on the remand motions shortly after receiving the final reply brief in the Sentry action, presently due November 6, 2009.

Accordingly, it is hereby ORDERED that (i) Plaintiffs' request to lift the PSLRA discovery stay is denied; and (ii) the Court defers any decision on Derivative Plaintiffs' request to lift the stay until after disposition of the remand motions.

So Ordered.

THEODORE H. KATZ
UNITED STATES MAGISTRATE JUDGE

Dated: October 27, 2009
New York, New York